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Supreme Court of the United States

October Term 1939

No. 579

UNION JOINT STOCK LAND BANK OF DETROIT,
Petitioner,

vs.

CARL BYERLY,
Respondent.

PETITION FOR REHEARING
BRIEF IN SUPPORT

ELMER McCLAIN,
Lima, Ohio.

WILLIAM LEMKE,
Fargo, North Dakota,
Counsel for Respondent Carl Byerly.

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PETITION FOR REHEARING

Note: All emphasis in this Petition and in the Brief which follows it is supplied.

To the Honorable, The Justices of the Supreme Court of the United States:

The respondent respectfully presents his petition for a rehearing and submits the following reasons, supported by his brief, why his prayer should be granted:

I

In the decision herein there exists a division of opinion upon an important point of profound importance to the greatest industry of the nation in which more persons are engaged and more property involved than in any other. It affects the administration of a settled policy of dealing with the difficult problems of agricultural indebtedness. Under similar circumstances, involving fewer persons and less property rehearings have been granted by this Court. *Home v. New York*, 122 U.S. 636; 134 U.S. 594; 119 U.S. 129. *Pollock v. Farmers*, 158 U.S. 601; 157 U.S. 429. *City v. Holmes*, 125 U.S. 694. *Caldwell v. Texas*, 141 U.S. 209. *Williams v. Conger*, 131 U.S. 390. *Gila v. Gila*, 205 U.S. 279.

II

The question in this case is whether the respondent was divested of his real estate by the sale in state foreclosure proceedings which was conducted by authority of the bankruptcy court in violation of Section 75 (o) of the Act of March 3, 1933, and later confirmed by the state court after the proceedings under Section 75 had been dismissed. The Court, three Justices dissenting in a separate opinion, held that he was so divested.

III

The Court in its majority opinion held that "it was error for the District Court, in the absence of the preliminary steps required by this subsection, to permit the sheriff to hold the sale", but that the "Error committed by it . . . could have been corrected by appeal from its order". The farmer debtor had no opportunity to appeal from the erroneous ex parte order of the bankruptcy court because it was unknown to him. When it was disclosed to him he acted promptly.

The Record, at the bottom of page 4, sets out this ex parte order of the bankruptcy court which is unanimously agreed to have been erroneous.

The Record at pages 9 and 10 shows that this erroneous ex parte order remained unknown to the farmer debtor, the respondent here, for more than nine months. He did not discover it until after the foreclosure sale had been confirmed and a deed had been delivered to the mortgage holder, who is the petitioner here, and recorded. He promptly applied to the bankruptcy court for redress during the same week he discovered that the erroneous order had been issued and that his farm had been sold in foreclosure. See his Application for Reinstatement at Record pages 9 and 10.

IV

Not only was the order purporting to permit the sale issued in violation of the special statute, Section 75 (o), but the general procedural statutes, outside of bankruptcy law, and the Rules in Equity were violated.

Section 9 of the Judicial Code provides that: "The District Courts . . . as courts of equity, shall be deemed always open for the purpose of filing any pleadings, . . . of making and directing all interlocutory motions, orders, rules, and other proceedings preparatory to the hearing, upon their merits, of all causes pending therein. Any district judge may, **upon reasonable notice to the parties,** make, direct, and award . . . all such . . . orders, rules, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court. U.S.C. Title 28, Section 13. This statutory provision was carried into Equity Rules 1 and 4.

Equity Rule 4, reads: **"Neither the noting of an order in the equity docket nor its entry in the order book shall of itself be deemed notice to the parties** or their solicitors; and when an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor, and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order."

Section 266 of the Judicial Code designated to apply where a temporary restraining order has been granted, requires that before it is disolved, or modified two days notice must be given to the party who obtained it. U.S.C. Title 28, Section 381.

Both the statute and the Equity Rules have been car-

ried into the present Rules of Civil Procedure in Rules 65 and 77.

We mention these references to the Judicial Code, the Equity Rules, and the Rules of Civil Procedure, to show that throughout federal jurisprudence generally, as distinct from bankruptcy law and farmer debtor proceedings, the requirement of due notice in matters of injunction or their modification is carefully preserved.

V

We most respectfully urge that Section 75 (o) in all its force is a clear mandatory prohibition **directed to the state court,** as much as to the bankruptcy court. In fact **the interdiction of Section 75 (o) is directed more intimately to the state court than to the federal court.** It reads: "the following proceedings . . . **shall** not be maintained, **in ANY court or OTHERWISE.**" These "proceedings" (foreclosure) could **never** be pending in the bankruptcy court; they are **always** pending in another court usually the state court. There is no exception, qualification or escape from Section 75 (o), except through the means prescribed in Section 75 (o) itself, whereby a pending foreclosure action may be maintained. Under Article VI of the Constitution Section 75 (o) is the Supreme Law of the Land. It is binding upon federal judges **and upon state judges and sheriffs.** Before the judge and the sheriff of the state court could take office each was required by the same Article VI of the Constitution to be bound by oath to support the Constitution of the United States. "This Constitution, and the Laws of the United States which are made in pursuance thereof; . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, . . . and all executive and judicial Officers . . . of the several States, shall be bound

by Oath . . . to support this Constitution; . . ." Constitution of the United States, Article VI.

The judge and the sheriff were also required by the Constitution of the State of Ohio to take oath to support the Constitution of the United States before assuming their respective offices: "Every person chosen or appointed to any office under this State, before entering upon the discharge of its duties, shall take an oath to support the Constitution of the United States . . . " Constitution of the State of Ohio, Article XV, Section 7.

We suggest that in addition to its own imperative words the significance of Section 75 (o) is augmented by the fact that it was created and inserted in addition to Section 75 (n) which subjects the farmer and his property to the **exclusive jurisdiction** of the bankruptcy court. If the bankruptcy court, the sheriff and the state court may unlawfully render Section 75 (o) ineffective, there remains little practical distinction between Section 75 (o) and Section 75 (n). To put it another way, Section 75 (o) has then been judicially repealed.

We must most earnestly urge that in our opinion the state court and its officer, the sheriff, were not entitled to rely upon the unlawful order of the district court purporting to grant permission to make the sale. **The mandatory terms of Section 75 (o) were expressly binding upon the state court and sheriff no less than they were binding upon the federal District Court.** The state court and sheriff were not justified in unlawfully attempting to conduct a sale by the mere reason that the federal district judge had unlawfully invited them to disregard Section 75 (o). They were not absolved from their constitutional oaths to obey the Supreme Law of the Land because the federal court had unlawfully disregarded it.

We agree that the federal district court did not lose jurisdiction by erroneously construing or applying the statute. This court has repeatedly and uniformly held that a bankruptcy court may not divest itself of its jurisdiction. We agree that the place to attack the unlawful order of the federal district court was in the federal courts and this the respondent has consistently and persistently done from the week he first learned that the federal district court had unlawfully acted.

VI

The effect of this decision, if permitted to stand, will in a large measure nullify the national legislation upon the subject of relief of farmer debtors which was initiated by the Act of March 3, 1933, and which has been developed and perfected by many decisions and amendments. The last amendment was the Act of March 4, 1940, which continued its provisions until March 3, 1944. This legislation has been clarified and enforced for its practical use by the following unanimous decisions of this Court:

Wright v. Vinton, 300 U.S. 440; (1937);
First National Bank v. Beach, 301 U.S. 435. (1937);
Adair v. Bank, 303 U.S. 350 (1938);
Wright v. Union Central, 304 U.S. 502, (1938);
John Hancock v. Bartels, 308 U.S. 180, (1939);
Gray v. Union Joint Stock Land Bank, 308 U.S. 523, (1939);
Morrison v. Federal Land Bank, 308 U.S. 524, (1939);
Kalb v. Feuerstein, 308 U.S. 433, (1940).

VII

Section 75 (o) is the buttress of the Act, and was designed to protect the negotiations between the farmer

debtor and his creditors from the strain and turmoil of foreclosure litigation. There can be no true negotiation in an atmosphere where contemporaneous litigation is possible. It is as important to individual creditors as to the farmer debtor that the status quo should be maintained for all alike. This part of Section 75 has never been amended.

The decision would permit a mortgage holder, as in this case, to obtain an unlawful ex parte authorization of a foreclosure sale in violation of Section 75 (o) and at an opportune moment divest the title of the farmer debtor providing it may be kept secret from him until it is confirmed at some time when the State Court has regained its jurisdiction. Section 75 (o) by its express terms is operative only during negotiations for composition or extension, that is until the "disposition of the composition or extension proposal by the court."

Such a situation will inevitably bring reproach upon the administration of a law which has been held by this court and by the lower courts to be self-executing and mandatory in every reported decision that has considered it. We cite these decisions:

Decisions of This Court

1. *Adair v. Bank*, 303 U.S. 350 (1938) at page 355: "To accomplish its purpose Section 75 provides that the filing of a petition shall effect a stay."

2. *Kalb v. Feuerstein*, 308 U.S. 433 (1940), Preliminary Print, at page 440: " . . . Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent **after hearing** of the bankruptcy court . . . "

Decisions of Circuit Courts of Appeals

3. *Bradford v. Fahey*, 76 Fed. (2d) 628 (1935) CCA 4.
4. *In re O'Brien*, 78 Fed. (2d) 715 (1935) CCA 2.
5. *Hoyd v. Citizens Bank*, 89 Fed. (2d) 105. (1937) CCA 6.
6. *Wilcons v. Penn Mutual*, 91 Fed. (2d) 417 (1937) CCA 10.
7. *In re Cresap*, 99 Fed. (2d) 722. (1938) CCA 7.
8. *Naylor v. Cantley*, 96 Fed. (2d) 761. (1938) CCA 8.
9. *In re Price*, 99 Fed. (2d) 691 (1938) CCA 7.
10. *Bernards v. Johnson*, 103 Fed. (2d) 567 (1939) CCA 9.
11. *Byerly v. Union Joint Stock Land Bank of Detroit*, 106 Fed. (2d) 576. (1939) CCA 6.
12. *Shadley v. Ludwig*, 106 Fed. (2d) 745 (1939) CCA 6.

Decisions of District Courts

13. *In re Freudenberg*, paragraph 3060 Bankruptcy Law Service, (1934). District Court, Wisconsin.
14. *Eaves v. Glenn*, 9 Fed. Supp. 647, (1934) District Court, Texas.
15. *Paine v. Capital*, 8 Fed. Supp. 500 (1934) District Court, Texas.
16. *In re Kalina*, 9 Fed. Supp. 170 (1934) District Court, Nebraska.
17. *In re Rank*, 9 Fed. Supp. 171 (1934) District Court, Nebraska.
18. *In re Duffy*, 9 Fed. Supp. 166 (1934) District Court, Iowa.
19. *In re Cope*, 8 Fed. Supp. 961. (1935) District Court, Colorado.
20. *In re Houser*, 9 Fed. Supp. 891 (1935) District Court, Illinois.
21. *In re Wogstad*, 10 Fed. Supp. 349 (1935) District Court, Wyoming.

22. *In re O'Brien*, 28 Fed. Supp. 715 (1935) District Court, New York.
23. *In re Newman*, 2 Fed. Supp. 427 (1935). District Court, Minnesota.
24. *In re Price*, 16 Fed. Supp. 836. (1936) District Court, Louisiana.
25. *In re Greaves*, 37 ABR NS 461 (1937) District Court, Mississippi.
26. *In re Brown*, 21 Fed. Supp. 935 (1938) District Court, Iowa.
27. *In re Helm*, Bankruptcy Law Service, paragraph 51339. (1938) District Court, Connecticut.

We believe that another instance of such uniform agreement upon the effect of a federal statute will not be found in American jurisprudence.

VIII

It is most respectfully urged that the District Courts are entirely creatures of the Congress. Congress alone has the sole constitutional power to give jurisdiction and to delineate exactly the limits and conditions of that jurisdiction. A District Court has such jurisdiction and only such jurisdiction as is given by statute. When a district court exceeds its authority, its act is coram non judice. The Congress did not enact Section 75 (o) with an implied understanding that the district court might utterly disregard it and proceed as the district judge though Congress should have enacted it. There is within Section 75 (o) no power whereby a district judge may exercise a discretion to modify its mandatory language. Mr. Justice Sutherland, speaking for the entire court, said in *Kline v. Burke*, 260 U.S. 226, at page 234: "Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at

its discretion, provided it is not beyond the boundaries fixed by the Constitution." In *Vallely v. Northern*, 254 U.S. 348, at page 353, Mr. Justice McKenna said for the whole Court: "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities." And at page 356: "For a court to extend the [bankruptcy] Act to corporations of either kind is to enact a law, not to execute one." In that case the insurance corporation had fully participated in the bankruptcy proceedings and its estate had been substantially administered before it filed a motion to rescind its adjudication. Section 75 (o) is no less mandatory and explicit than Section 4 (b) which was considered in *Vallely v. Northern* and here Mr. Byerly had no part in the ex parte unlawful order of the District Court. He was ignorant of it.

IX

Counsel for the respondent respectfully submits in further support of this petition the brief which follows.

Wherefore the respondent respectfully prays that his petition for rehearing be granted and that upon further consideration the judgment of the Circuit Court of Appeals for the Sixth Circuit be affirmed.

May 9, 1940.

Elmer McClain,
Lima, Ohio,
William Lemke,
Fargo, North Dakota,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

As one of counsel for the respondent I certify that the within petition for rehearing and the brief in support of it are presented in good faith and not for delay.

Elmer McClain,
One of Counsel for
Respondent.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

We earnestly suggest that the decision, if permitted to stand, will introduce a discordant note into the administration of farmer debtor proceedings. It will render complicated and indefinite a statute which various acts of Congress and the several unanimous decisions of this Court have made simple and certain for both debtor and creditor.

Section 75 as it now appears in the statutes is the result of numerous amendments intended to insure that the national policy relating to agricultural indebtedness shall be clearly understood and certainly enforced. This Court in its eight unanimous decisions involving Section 75 which are cited under Heading VI of the foregoing Petition for Rehearing has meticulously adhered to the national legislative policy as expressed by the terms of the statute.

Very recently this Court in *Keifer v. Reconstruction*, etc., 306 U.S. 381, at page 390, referred to "a definite attitude on the part of Congress which should be given hospitable scope." That decision in its Note 4, besides citing several decisions of this Court and other authorities, quoted a decision by Mr. Justice Holmes while on Circuit in *Johnson v. United States*, 163 Fed. 30, where he said: "The legislature has the power to decide what the policy of the law shall be and if it has intimated its will, however, indirectly, that will should be recognized and obeyed."

The two opinions of this Court upon Section 75 preceding this one gave unanimous utterance to the following expressions relating to the legislative policy:

In *John Hancock v. Bartels*, 308 U.S. 180, Preliminary Print, the Chief Justice said for the Court at page 183: "We think that the District Judge failed to

follow the mandate of the statute . . .". At pages 184 and 185: "The plain purpose of Section 75 was to afford relief to such debtors who found themselves in economic distress however severe, by giving them a chance to seek an agreement with their creditors (subsections (a) to (r)) and, failing this, to ask for the other relief afforded by subsection (s)." At page 185, referring to the words "good faith" in Section 75 (i): "That provision manifestly hits at secret advantages to favored creditors or other improper or fraudulent conduct." At the bottom of page 187, the opinion states that the Court is concerned "merely with the duty to follow the procedure which the statute defines and the District Court failed to observe."

In *Kalb v. Feuerstein*, 308 U.S. 433, Preliminary Print, Mr. Justice Black said for the Court at the top of page 440: "We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending." In Note 12 on the same page: "That a state court before which a proceeding is competently initiated may—by operation of supreme federal law—lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our federal system. See *Moore v. Dempsey*, 261 U.S. 86. Cf. *Johnson v. Zerbst*, 304 U.S. 458". At the top of page 443 of the Kalb decision the opinion continues: "Congress set up in the Act an exclusive and easily accessible statutory means for rehabilitating distressed farmers who, as victims of a general economic depression, were without means to engage in formal

court litigation." Again on page 443 at the end of the first paragraph: "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts." Also at page 444: "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor. The protection of the farmers was left to the farmers themselves or to the commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Prior opinions of this Court have been in the same vein. In *Adair v. Bank*, 303 U.S. 350, at the bottom of page 355, it was said by Mr. Justice Reed for the Court: "To accomplish its purpose, Section 75 provides that the filing of a petition shall effect a stay". Note 5 appended to this statement is a quotation in full of Section 75 (o).

In *First National Bank v. Beach*, 301 U.S. 435, Mr. Beach, a merchant, suffered reverses and retired early in the depression to his family homestead of 192 acres which was subject to a mortgage of $100,000. He resided on 42 acres and rented out the rest. He had 200 chickens at first, but only 50 later; 3 sheep; 1 horse; and some old farm tools. Out of his $4000 income $1500 was from non-farm property, $2200 was from farm rentals and only the bal-

ance of $300 was from his farm work. In discussing the statutory definition of a farmer in Section 75 (r) the opinion, by Mr. Justice Roberts at the bottom of page 438 says: "Occasions must have been in view when the receipt of income derived from farming operations would make a farmer out of some one who personally or primarily was engaged in different activities." . . . "We refuse to be led away from the limitations of the concrete case". At the lower half of page 439: "True, the money returns were scanty. . . . The scantiness of the yield may have turned him into a bankrupt, but it did not change his occupation". At the bottom of page 440: "We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting."

In *Wright v. Vinton*, 300 U.S. 440, which was the first decision of this Court upon this statute, it was said by Mr. Justice Brandeis for the Court, at pages 463 and 464: "Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with the provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent."

Examination of the Acts of Congress relating to farmer debtor proceedings which were initiated with the Act of March 3, 1933, and have continued to that of March 4, 1940, discloses a progressive and persistent legislative intent to secure the administration of a definite policy. That policy, which was entitled in the first Act "Provisions for the Relief of Debtors", is that with a minimum of procedural complications, indeed **without assistance of counsel** (see Section 75 (q)) a farmer debtor shall be permitted within the exclusive jurisdiction of the bankruptcy court—which court is **prohibited from surrendering its jurisdiction**—to have three opportunities to save his farm from foreclosure. The **first** is by direct negotiation with his creditors and with the approval of the court (Section 75 (a) to (r)) and, failing that, **second** by giving him more than three years to accumulate means to refinance his secured debt at the value of the security (Section 75 (s)) and, failing that, **third** by having opportunity to redeem his farm from final public sale (75 (s) (3)).

This was a new advance in the progressive exercise of the bankruptcy power expressly granted in the Constitution. It was natural that such a novel departure from established bankruptcy tradition, under which a petitioner theretofore had always been promptly and completely divested of his property, should be coldly received by some of the two hundred and odd judges of the federal courts. It was. The first reported decision, *In re Osterritter*, 23 ABR NS 332; 3 Fed. Supp. 674, (1933), deprived the farmer debtor who had filed a petition under Section 75 of an extension of a secured debt against his exempted real property. The second, *In re Conciliation Commissioner*, 24 ABR NS 245; 5 Fed. Supp. 131, observed that the object of the law "is outside of bankruptcy to coerce creditors to enter into new contracts".

After the general policy of the law had been accepted all sorts of loop holes were discovered by interpretation which would sidestep the declared policy. This process was accentuated by the fact that large corporate interests held many mortgages in every part of the nation whereas farm mortgagors usually were holders of small units and were financially embarrassed. An interpretation which was suggested and rejected in one case could be repeatedly offered in another until finally adopted. Usually the farmer debtor, often without counsel, was unable to present properly his case against a mortgage holder who was a participant in a concercerted and continuous attack against the law. All this was suspected, and Congress frequently acted to counteract the results. It was not until June 13, 1939, that the manager of the Association of Life Insurance Presidents testified before the Temporary National Economic Committee that the Association in a single year spent $60,000.00 for attorney fees and $3579.28 for expenses in litigation to defeat farmer debtor legislation. These sums were expended by the Association in a single suit in one court despite the fact that no Life Insurance Company was a party. Neither it nor any Life Insurance Company appeared as amicus curiae, or otherwise. The litigant aided was a Joint Stock Land Bank mortgage holder. See Part 10, Life Insurance Hearings before the Temporary National Economic Committee, 76th Congress, First Session, pages 4345-4346, 4352-4354; 4355; 4750.

This policy, which was originally recommended by a Republican President and first expressed in legislation in 1933, has been steadfastly maintained by a Democratic Administration through the varying political complexions of five Congresses, the Seventy-Second to the Seventy-Sixth inclusive.

Repeatedly Congressional Committees and members of the House and Senate have declared that the courts failed to recognize and obey the policy intended to be administered under Section 75. Many amendments were enacted to rectify what the Congress deemed to be misinterpretations of its **original intention.**

For instance, Senate Report No. 985, 74th Congress, First Session, at page 2 declared that:

> "Obviously, these courts are reasoning too technically, and have failed to carry out the **intention of Congress,** which was to protect the farmer's property and home. Other courts have just held the opposite, and have given full protection, and carried out the **intent of Congress**". " . . . it was the **intention of Congress,** when it passed Section 75, that the debtor farmer and all of his property should come under the jurisdiction of the court of bankruptcy, and that the benefit of the act should extend to the farmer prior to confirmation of sale, and during the period of redemption and **that no proceedings after the filing of the petition should be instituted, or,** if instituted prior to the filing of the petition, **should not be maintained in any court, or otherwise."** House Report No. 1808, page 2, of the same session reads substantially the same.

In the present Seventy-Sixth Congress when proposed amendments were pending which resulted in the Act of March 4, 1940 extending Section 75 until 1944, the proposed amendments were the subject of Senate Report 1045. The following comments are found in that Report.

> Page 2: **"It was the intent of Congress,** when it passed Section 75, that the stay should be for three years provided the farmer complied with the provisions of the Act and paid the rental as fixed by the court and complied with the orders of the court.

It was never the intention of Congress that the court should arbitrarily dismiss the farmer's petition because it, the court, decided that the farmer could not pay all of his debts at the end of three years or that he was too poor to go through bankruptcy. **The intent of Congress was**, and is, that the farmer debtor is to pay the rental and have three years, not to pay all of his debts but to pay the value of the property. Very few bankrupts are able to pay all their debts."

"This new provision simply correct abuses of judicial discretion. It prevents judicial legislation. We may state further that many of the district courts and some of the Circuit Courts of Appeals and the Supreme Court have given proper construction to the language in the present Act, but we are sorry to note that others have misconstrued it."

Page 3, referring to a proposed amendment: "This is simply clarifying language. **That was the intention of Congress** in the present Section 75. Surely the practice now followed by some of the District Courts, where they permit the farmer to file his petition and to proceed under the Act for one year or more and then upon the motion of some mortgagee dismiss the proceedings and throw the farmer to the wolves, is unjustifiable."

Members of Congress who represented every portion of the Nation and were familiar with the conditions and problems pertaining to agriculture in general and to farmers in particular devised the provisions of Section 75 (o). These provisions will be found in no other law for the relief of debtors. These legislators knew that individual farmer debtors owing relatively small sums, secured by mortgages upon their entire homes and farm holdings, and having already depleted their resources in vain attempts to stave off foreclosure, could be no match for great corporate mortgage holders having access to unlimited re-

sources which could be employed in harassing litigation. They devised Section 75 (o) to maintain the status quo and to make it certain that when a farmer debtor invoked Section 75 he would be secure from all litigation while negotiating for settlement. They intended that he should be on a basis of equality with his secured creditors. Theoretical freedom to litigate between a farmer debtor and a corporate mortgage holder would be no freedom at all. It would be similar to the long exploded theoretical freedom of contract between an employee and a corporate employer.

We can not conceive how Congress could more clearly have expressed its will that every proceeding in a pending foreclosure action should be absolutely prohibited during the pendency of proceedings under Section 75 (a) to (r). It provided, in a spirit of fairness to meet some extraordinary situation where foreclosure might without harm be permitted to proceed, that by procedure in accord with due process of law through application to the judge, reference to the conciliation commissioner, hearing before the conciliation commissioner and report to the judge, the judge was empowered to authorize the foreclosure.

On the contrary, if this decision is to be the law, a designing mortgage holder may easily circumvent the national policy expressed in Section 75 (o). He may, as in this case, obtain an unlawful ex parte order from the bankruptcy court when a foreclosure sale is being advertised, purporting to authorize the sheriff to proceed. This he may do despite the fact that potential bidders, including the farmer debtor himself, who know that the foreclosure action was stopped but do not know that the judge has unlawfully told the sheriff to conduct a sale, will not attend at the date set for the sale. Having accomplished so much in defiance of law, the mortgage holder is then ready at

the first opportunity when the inhibitions of the law are lifted to pounce upon the unsuspecting farm owner and suddenly, without readvertisement of foreclosure sale, divest him of his property. It will encourage a reversion to the old repudiated "game" theory of a law suit. It will facilitate the setting of a trap for the unwary farmer-debtor upon the specious plea to the court that a sale in foreclosure is really innocuous till confirmed, (as here, see Record page 5, top of page; also Record 29, third full paragraph). The potential harm of the sale will not become apparent until confirmation when the trap is sprung.

The supposed right of appeal against such admittedly unlawful acts of both the mortgage holder and the bankruptcy court is no right at all. In the facts of this case we do not have a situation where the farmer debtor, knowing of the ex parte application by the mortgage holder for an unlawful order, and knowing that an unlawful order had been issued, stood by without raising objection. Mr. Byerly had no knowledge of the application, of the order, or of the sale until the state court purported to confirm it nine months later. He immediately applied to the bankruptcy court for redress when he learned that the law had been violated. We think he has been deprived of due process of law by such reasoning.

Among other implications of this decision, if it stands, is that a farmer debtor who invokes Section 75 (a) to (r) for composition or extension, must, while negotiating with his various creditors, keep a constant all-seeing eye upon the bankruptcy court lest without his knowledge, it unlawfully assist a secured creditor to have a foreclosure sale which the law expressly prohibits. To preserve his supposed right of appeal under Section 25 of the present Bankruptcy Act he must at all times be prepared—by effective surveillance of the bankruptcy court—to initiate an appeal

by notice to the District Court or by application to the Circuit Court of Appeals or, in the alternative, both.[1] This, like the fictitious freedom of contract under actual conditions is an impossible handicap.

We here state the number of miles a farmer debtor in each state might be required to travel **one way** from his farm to the bankruptcy court where his farmer debtor proceeding is pending. His **round trip** would be twice the distance given. For example, the longest trip to a bankruptcy court in Montana would be 918 miles. In Vermont it would be 80 miles. Alabama, 123; Arizona, 206; Arkansas, 151; California, 378; Colorado, 290; Connecticut, 53; Delaware, 105; Florida, 125; Georgia, 105; Idaho, 257; Illinois, 121; Indiana, 103; Iowa, 117; Kansas, 384; Kentucky, 125; Louisiana, 148; Maine, 220; Maryland, 85; Massachusetts, 84; Michigan, 179; Minnesota, 233; Mississippi, 178; Missouri, 181; Montana, 459; Nebraska, 189; Nevada, 411; New Hampshire, 78; New Jersey, 80; New Mexico, 419; New York, 190; North Carolina, 145; North Dakota, 195; Ohio, 142; Oklahoma, 181, Oregon, 315; Pennsylvania, 124; Rhode Island, 43; South Carolina, 107; South Dakota, 197; Tennessee, 115; Texas, 328; Utah, 318; Vermont, 40; Virginia, 105; Washington, 290; West Virginia, 190; Wisconsin, 206; Wyoming, 200.

The **one-way** distances are here arranged for fifteen states in the order of population: New York, 190; Pennsylvania, 124; Illinois, 121; Ohio, 142; Texas, 328; California, 378; Michigan, 179; Massachusetts, 84; New Jersey, 80;

Note 1: Under the Bankruptcy Act as it was when the farmer debtor proceedings in this case was pending on appeal were more cumbersome (by petition and allowance in the district court) and differences of opinion over "controversies" and "proceedings" made two appeals necessary to be certain that if one alone were taken or applied for it should prove, on objection, to have been the wrong one as was the first appeal in Wayne v. Owens—Illinois 300 U.S. 131.

Missouri, 181; Indiana, 103; North Carolina, 145; Wisconsin, 206; Georgia, 105; Alabama, 123.

The one-way distances are here arranged for fifteen states in the order of rural population: Texas, 328; Pennsylvania, 124; North Carolina, 145; Ohio, 142; New York, 190; Georgia, 105; Illinois, 121; Alabama, 123, Kentucky, 125; Missouri, 181; Tennessee, 115; Mississippi, 178; Virginia, 105; Oklahoma, 181; Michigan, 179.

The one-way distances are here arranged for fifteen states in the order of number of farms and of farmers: Texas, 328; Mississippi, 178; North Carolina, 145; Missouri, 181; Kentucky, 125; Tennessee, 115; Alabama, 123; Ohio, 142; Arkansas, 151; Georgia, 105; Illinois, 121; Iowa 117; Oklahoma, 181; Minnesota, 233, Indiana, 103.

Because we, as counsel for numerous farmer debtors in many portions of the nation, have been intimately associated for many years with the problems arising out of agricultural indebtedness, and because from the beginning we have been almost constantly involved in litigation concerning the interpretation and practical application of Section 75, we feel that we do not unduly stress the havoc in the purposeful administration of this law which will result from the present decision if it is to be the final expression of this Court. Even though it might possibly be rectified by some future decision, the almost impossible task of presenting a farmer debtor's case, for lack of funds and because of the press of litigation in this Court, makes it inevitable that many farmer debtors would be deprived of the benefits of Section 75 before another proper case could be presented.

We can not but feel that in this instance, if the farmer debtor is by the unlawful action of the bankruptcy court finally divested of his property, it was without due proc-

ess of law because he did not have his day in court to protect himself from an unlawful order of which he had no knowledge.

May 8, 1940

Respectfully submitted,

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Lima, Ohio
William Lemke,
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Counsel for Carl Byerly, Respondent.

Dissent p. 1

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1939.

Union Joint Stock Land Bank of Detroit, Petitioner,
vs.
Carl Byerly.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

September 1, 1932, the petitioner instituted a mortgage foreclosure suit against respondent in the Common Pleas Court of Madison County, Ohio. The cause was prosecuted to judgment and advertisement was made of a sheriff's sale of the property to take place November 24, 1934.

November 19, 1934, the respondent filed his petition in the United States District Court under § 75 of the Bankruptcy Act,[1] and the court issued an order restraining proceedings in the foreclosure suit until the further order of the court.

November 23, 1934, the District Court, on application of the petitioner, without reference of the matter to a conciliation commissioner, modified the restraining order to permit the sale of the premises as advertised but enjoined any further proceedings, particularly confirmation of the sale or execution of sheriff's deed.

November 24, 1934, the sheriff, as permitted by the modification of the restraining order, held the sale as advertised. The petitioner bid the property in and the sheriff made return of the sale.

December 14, 1934, the District Court approved the respondent's petition under § 75 of the Bankruptcy Act and ordered a reference to a conciliation commissioner. The latter reported that no agreement could be reached between the respondent and his creditors.

February 11, 1935, the respondent abandoned proceedings under subsections (a) to (r) of § 75 and filed an amended petition to be adjudged a bankrupt pursuant to § 75(s).[2]

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467, 1470.

[2] Subsection (s) was added to Section 75 by the Act of June 28, 1934, c. 869, 48 Stat. 1289.

May 27, 1935, this court held certain features of § 75(s) unconstitutional. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555.

August 26, 1935, on the application of the respondent, the District Court ordered that, because of the unconstitutionality of § 75(s), the respondent's petition and amended petition be dismissed and that the case be terminated.

August 28, 1935, § 75 was amended[3] to meet the decision in *Louisville Bank* v. *Radford, supra*. The Act, as so amended, provided in paragraph 5 of § 75(s):

"This Act shall be held to apply to all existing cases now pending in any Federal court, under this Act, as well as to future cases; and all cases that have been dismissed by any conciliation commissioner, referee, or court because of the Supreme Court decision holding the former subsection (s) unconstitutional, shall be promptly reinstated, without any additional filing fees or charges."

September 10, 1935, the sheriff's sale was confirmed by the Common Pleas Court. Subsequently this action was, on appeal by respondent, affirmed by the Court of Appeals of Madison County.

September 19, 1935, the sheriff's deed was delivered to the petitioner and was recorded.

September 24, 1935, the respondent moved the District Court for reinstatement of his bankruptcy case. The motion was granted but apparently no amended petition has been filed nor any adjudication entered under § 75(s).

May 8, 1936, the petitioner moved the District Court for an order of disclaimer of the real estate in question.

October 22, 1936, an order of disclaimer was entered. October 26 a petition for rehearing was filed by the respondent and was entertained by the court.

April 17, 1937, the respondent moved the District Court that the proceedings in bankruptcy be referred to a conciliation commissioner pursuant to § 75(s).

May 6, 1937, the District Court overruled the respondent's petition for a rehearing of the order of disclaimer.

May 8, 1937, the District Court overruled the motion of the respondent to refer the cause to a conciliation commissioner.

May 27, 1937, the respondent petitioned the District Court for an appeal to the Circuit Court of Appeals from the order denying

[3] Act of August 28, 1935, c. 792, 49 Stat. 942.

his petition for rehearing of the order of disclaimer and from the order denying his motion to refer the cause to a conciliation commissioner and, on the same date, the District Court allowed an appeal.

June 3, 1937, the respondent petitioned the Circuit Court of Appeals for leave to appeal from the orders of the District Court and, June 7, 1937, leave was granted.

The Circuit Court of Appeals reversed the orders of the District Court, holding that, at the time of filing his new petition under § 75, as amended, the respondent had a property right,—a right of redemption—in the mortgaged premises, which had not been cut off by the sale and its confirmation in the State court, and that the cause should be referred to a conciliation commissioner and prosecuted before him.[4] On account of the importance of the question involved in the administration of the Bankruptcy Act, we granted certiorari.

The petitioner asserts that the court below erred, as the action of the District Court modifying the restraining order and permitting a sale of the mortgaged premises was authorized by the bankruptcy act and, if not, it is binding upon the respondent since he failed to except to or appeal from it.

The petitioner further asserts that the respondent's procurement of the termination of the original bankruptcy case amounted to a waiver of any irregularity which occurred while the proceeding was pending and precluded the respondent from objecting to such irregularity. Further, petitioner contends that the sale made by the sheriff did not change the legal status of the debtor and his property since his right of redemption, under Ohio law, remained until confirmation of the sale by the State court; and, although that court was without jurisdiction while the original bankruptcy proceeding was pending, it regained such jurisdiction by the termination of the bankruptcy case, and had exclusive jurisdiction of the parties and the subject matter, when the decree of confirmation was entered. The claim is that the decree of confirmation cannot be collaterally attacked in the bankruptcy court.

The respondent, on the other hand, argues that the express provisions of § 75, in force at the time the sale was made, rendered void the District Court's permission to make the sale and the sheriff's

[4] Byerly v. Union Joint Stock Land Bank of Detroit, 106 F. (2d) 576.

action in making it; and that confirmation or delivery of a deed can give no validity to such void action, which the bankruptcy court should, therefore, have disregarded.

First. The action of the District Court in permitting the holding of the sale was not void but voidable; and the sale made pursuant thereto was not void.

Section 75, as it stood during the pendency of the original bankruptcy proceeding, provided:

"(e) . . . . After the filing of the petition and prior to the confirmation or other disposition of the composition or extension proposal by the court, the court shall exercise such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors."

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court. In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the court, the title, powers, and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition or answer was filed."

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:"

. . . . . .

"(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

The provisions of subsection (p) as it was when the petition was filed have no application. That subsection was amended by the act of August 28, 1935, *supra*, to provide "The prohibitions of subsection (o) shall apply to all judicial and official proceedings in any court or under the direction of any official" . . . . This amendment was made after the dismissal of the bankruptcy case.

Exclusive jurisdiction of the debtor and his property vested in the District Court on the filing of the petition. Up to that time jurisdiction of the debtor and the mortgaged property was in the State court. Without action by the District Court the State court could not have proceeded further.[5] But without changing the status of the debtor's right of redemption the federal court gave permission to the State officer to hold the sale. The sale was, however, incomplete until confirmation by the court.[6] Until confirmed it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceeding was pending.

In view of the provisions of subsection (o), it was error for the District Court, in the absence of the preliminary steps required by that subsection, to permit the sheriff to hold the sale.[7] But the court had jurisdiction in the premises. Error committed by it in the exercise of that jurisdiction could have been corrected by appeal from its order.[8] The State court and its officer, the sheriff, were entitled, in view of the District Court's plenary jurisdiction over the debtor and his property, to rely upon the order granting permission to make the sale. The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable, but not void, and was not to be disregarded or attacked collaterally in the State court.[9]

Second. The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.

Although the State court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State court's procedure, it was as if no bankruptcy case had ever existed. With jurisdiction of the parties and the subject matter, the State court entered a decree confirming the sale and au-

[5] Kalb v. Feuerstein, Nos. 120, 121, Oct. T. 1939.

[6] Bassett v. Daniels, 10 Oh. St. 617, 619; Reed v. Radigan, 42 Oh. St. 292, 294.

[7] Kalb v. Feuerstein, *supra.*

[8] Compare John Hancock Mutual Life Insurance Co. v. Bartels, No. 33, Oct. T. 1939.

[9] Thompson v. Tolmie, 2 Pet. 157, 163; Voorhees v. Bank of United States, 10 Pet. 449; Florentine v. Barton, 2 Wall. 210; Cooper v. Reynolds, 10 Wall. 308; McNitt v. Turner, 16 Wall. 352, 366; Simmons v. Saul, 138 U. S. 439; Noble v. Union River Logging R. Co., 147 U. S. 165, 173; Insley v. United States, 150 U. S. 512.

thorizing a deed, the sheriff executed his deed, which was duly recorded, and the petitioner went into possession as purchaser of the mortgaged premises. Thereafter the respondent moved for reinstatement of the bankruptcy case and his motion was granted. In the interim, no bankruptcy cause was pending and the State court had jurisdiction to proceed as it did.

We cannot assent to the view advanced by the respondent that the amendment to § 75 of August 28, 1935, automatically reinstated the earlier proceeding which had been dismissed; or that the motion to reinstate the proceeding operated by relation to close the gap of twenty-nine days between the dismissal of the original bankruptcy case, and the State court's action in confirming the sale, and to deprive the latter of jurisdiction to act in the interim. The amendatory act merely authorized the reinstatement of proceedings which had been dismissed. The case is analogous to one wherein a state court foreclosure proceeding has been completed and deed delivered to the sheriff's vendee prior to the filing of a petition under § 75.[19] The provision for the reinstatement, upon the debtor's motion, of a proceeding theretofore dismissed and finally terminated, cannot affect the jurisdiction of the court conducting the foreclosure proceeding when no bankruptcy cause was pending.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131, relied upon by the respondent, is not in conflict with our decision. There a petition in bankruptcy filed under § 77B was dismissed by the bankruptcy court, not on motion of the bankrupt but at the instance of mortgage creditors and over the bankrupt's objection. In due time a petition for rehearing was filed. With notice of the filing of this petition for rehearing, and that it would be set for hearing before the bankruptcy court, the creditors took further steps in a foreclosure proceeding pending in a State court. The District Court entertained the petition for rehearing and an amended petition. The creditors who were prosecuting the foreclosure proceeding in the State court appeared and were heard in opposition.

In entertaining the petition for rehearing the District Court found that good cause existed for vacation of its order of dismissal and reconsideration of the cause; that the application for rehearing had been seasonably presented, and that no rights had vested in reliance upon its earlier order of dismissal which would be disturbed by setting aside the order.

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[19] See *Wright* v. *Union Central L. I. Co.*, 304 U. S. 502, 508.

The petition was dismissed, the debtor appealed to the Circuit Court of Appeals and was granted a supersedeas. From an order of the Circuit Court of Appeals affirming the dismissal of the petition by the District Court the debtor sought certiorari from this court. The State court in which the foreclosure proceeding was pending had full notice of all of these facts when it proceeded to consummate the foreclosure sale. We held that, in the circumstances, no rights were acquired under the State court proceedings since termination of the bankruptcy case did not occur until final disposition of the efforts in the District Court and on appeal to reverse the decree of dismissal.

The District Court was right in refusing to refer the reinstated cause to a conciliation commissioner. Since the foreclosure proceedings had been completed and title had passed thereunder prior to the filing of the debtor's petition for reinstatement, it would have been a vain thing to refer the cause to a conciliation commissioner for administration of property which no longer belonged to the debtor.[11] We have no occasion to pass upon the authority of the court to enter an order of disclaimer. It is sufficient that the court's action in refusing to refer the cause to a conciliation commissioner was justified. That order, we think, should have been affirmed.

It is said that, even where title has passed from the mortgagor in foreclosure proceedings before the filing of the petition, the debtor should be, if he so requests, adjudicated a bankrupt so that a trustee may, if so advised, challenge the validity of the sale. Here, however, there is no suggestion of any infirmity in the petitioner's title save that the sale was made in violation of the prohibitions of the bankruptcy act. But that sale was made under leave of the bankruptcy court and it was within the State court's jurisdiction, when no bankruptcy proceeding was pending, to confirm the sale and order delivery of a deed. If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding. The fact is that the debtor appealed from the confirmation of the sale to the Court of Appeals of Madison County, Ohio, which affirmed the decree of the Common Pleas Court. An issue of fraud alleged to have been practiced upon the debtor to obtain his withdrawal of his original bankruptcy proceeding was there finally decided against him.

The judgment of the Circuit Court of Appeals must be reversed.

So ordered.

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[11] Compare Wright *v.* Union Central L. I. Co., *supra.*

SUPREME COURT OF THE UNITED STATES.

No. 579.—October Term, 1939.

Union Joint Stock Land Bank of Detroit, Petitioner, *vs.* Carl Byerly. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 22, 1940.]

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy, dissenting.

We believe that to deny this farmer the benefits of the Act because the purchase by the mortgagee at the Sheriff's sale was confirmed during the short interval between the dismissal of his petition and its reinstatement, would be largely to defeat the purposes of the Act.

After the original subsection (s) of the Frazier-Lemke Act was declared unconstitutional by the decision of this Court, May 27, 1935,[1] this farmer's petition was dismissed, August 26, 1935. A scant two days after the dismissal, August 28, Congress enacted the present Frazier-Lemke Act designed to supply the constitutional deficiency and providing that all cases dismissed because of that decision "be promptly reinstated."[2] After the filing of the petition and even before dismissal, the bankruptcy court allowed this farmer's property to be sold by the Sheriff under foreclosure in the State Court. And it is admitted that the order purporting to permit that sale was erroneous because entered in disregard of the requirements of subsection (o).[3] The Ohio State court confirmed the Sheriff's sale, September 10, 1935, a date prior to the lapse of the thirty day period within which an appeal would lie from an order of dismissal.[4]

Instead of appealing, the farmer, within the thirty day period, prayed relief from the dismissal decree by reinstatement in the

[1] Louisville Joint Stock Land Bank *v.* Radford, 295 U. S. 555.

[2] 75 (s) (5).

[3] As we view the effect of reinstatement, it is unnecessary to determine whether the bankruptcy court's order was not merely erroneous, but void.

[4] 11 U. S. C. 47, 48.

District Court itself. In his application for reinstatement, he alleged that dismissal of his petition had been induced by the deliberate misrepresentations of the mortgagee-bank, that he had no notice of the consummation of the Sheriff's sale until several days after it took place and that he wished to avail himself of Section 75 as amended August 28. Upon the prayer "that his . . . proceeding . . . be reinstated as of the date of its . . . . dismissal," the case was reinstated. We do not understand that either the power of the bankruptcy court to reinstate or the reinstatement which was in fact granted, is questioned.

Until disposition of the farmer's petition, he was entitled to the protection and benefit of the Act, and the bankruptcy court had exclusive jurisdiction of his property.[5] Dismissal of the proceeding did not constitute its final disposition where reinstatement was available. Certainly, this must hold true at least for the period of time after dismissal during which the farmer had a statutory right to appeal from the District Court's action.[6] Otherwise, even appeal might be wholly unavailing and futile. When a court of bankruptcy reinstates a case previously retired from the docket, as this farmer's case was reinstated, the court reconsiders the cause on the merits upon the *original* as well as any supplemental petitions unless rights have "intervened which would render it inequitable to reconsider the merits." *Wayne Gas Co. v. Owens Co.*, 300 U. S. 131, 137, 138. We find no intervening equities here.

In the *Wayne* case, a corporate reorganization in 77(b) was dismissed and subsequent to the dismissal a State court confirmed a foreclosure sale of the debtor's property which had been decreed prior to the filing of the 77(b) proceeding. After the Circuit Court of Appeals had denied the debtor's petition for allowance of an appeal and the time for appeal as of right had expired, the bankruptcy court reinstated the proceeding and reheard the case upon

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[5] Kalb v. Feuerstein, — U. S. —.

[6] "An appeal is a proceeding in the original cause and the suit is pending until the appeal is disposed of. . . . When the final judgment was reached it determined the rights of . . . [the parties] *ab initio*, . . ." MacKenzie v. Engelhard Co., 266 U. S. 131, 143. "Where a decree has not been enrolled, or where it is subject to modification upon motion, or where the court might grant a rehearing, or where an appeal might be taken, or where the costs had not been taxed, or where no execution had issued, it not being in condition to issue execution, . . . the case could not be said to have reached that stage where it could be said it was not pending in that court." Brannon v. Commonwealth of Kentucky, 162 Ky. 350, 357-8. Cf. State v. Tugwell, 19 Wash. 238, 43 LRA 717; Bloom v. People, 23 Colo. 416; State *ex rel.* Andreu v. Canfield, 40 Fla. 36, 44; Brown v. Campbell, 100 Cal. 635, 646; Ex parte Howland, 3 Okla Crim. 142, A. C. 1912, 840.

the merits. The plan of reorganization was again found wanting and the court entered a second order of dismissal. The debtor's appeal from the second dismissal was in turn dismissed by the Circuit Court of Appeals on the ground that lack of power in the District Court in bankruptcy rendered the order of reinstatement—as well as the second order of dismissal—void.[7]

When the case reached here, arguments presented by the foreclosure purchaser were in substance those upon which we are now asked to reverse the court below—that the first order of dismissal had terminated the cause (so that an appeal not taken within thirty days of its entry was not timely); and that the State court's confirmation of sale, after dismissal, had finally divested the bankrupt of all title to its foreclosed property, leaving no property for administration by the bankruptcy court (and the controversy was therefore moot).

This Court denied these contentions, and held that the dismissal had not terminated the proceeding; that the controversy was not moot and that the District Court had properly found that no intervening rights had accrued to divest the debtor of its property foreclosed subsequent to the dismissal in the bankruptcy court; that the rehearing had been sought in good faith and with due diligence and that the Circuit Court of Appeals had erred in not passing upon the merits of a plan of reorganization which included the property sold under the State court's order. The decision here thus approved the exercise of the bankruptcy court's jurisdiction over the encumbered property of the debtor which, after dismissal, had been bought in the State court foreclosure by creditors who were parties to the 77(b) proceedings and who "went forward with the proceedings in the State court, looking to a sale of the debtor's property, with full knowledge that a rehearing might be granted . . . ." *Id.*, 135.

Accordingly, the case was not remanded to the District Court for reconsideration of its finding that no rights cognizable in equity had intervened as a result of the State court foreclosure. Instead, the remand went to the Court of Appeals for further proceedings. And that Court properly construed the mandate to require consideration of the merits of the debtor's plan which assumed ownership in the debtor of the particular property upon which foreclosure had been attempted.[8]

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[7] 84 F. (2d) 965.

[8] Wayne Gas Co. v. Owens-Illinois Glass Co., 91 F. (2d) 827.

So here, as in the *Wayne* case, State court proceedings subsequent to dismissal, but while further proceedings could be had in bankruptcy, did not divest the debtor of his property; there "was no abuse of sound discretion in granting the motion [for reinstatement] and reconsidering the cause"; the district court in bankruptcy had "the power for good reason, to revise its judgment [of dismissal and to reinstate] upon seasonable application and before rights . . . [had] vested on the faith of its action."[9] *Id.*, 137, 138. And its general power to do so at least during the period allowed for taking an appeal was reinforced by recognition of the specific statutory right of reinstatement in the amended 75(s), which sprang into being only two days after dismissal of this farmer's petition. Paralleling the situation presented by the *Wayne* case, not only was the mortgagee-purchaser here a party to the 75 proceeding, but the State court itself may be said to have acted with knowledge that the dismissal—of which it was notified—did not necessarily represent the last step in the Federal court proceeding. Cf. *Id.*, 135.

Here, the only asserted rights which intervened against this farmer-debtor were not those of a *bona fide* purchaser. The purchaser was the mortgagee who was a party to the Section 75 proceeding and who relied—at least in part—on an order of the bankruptcy court admittedly erroneous because contrary to the Frazier-Lemke Act, and rendered at the mortgagee's instigation. Therefore, the mortgagee-purchaser is not entitled to rely upon the status acquired by it in the State court after dismissal as precluding further consideration of the petition for composition. Cf. *Id.*, 135. To decide otherwise than that the dismissal here did not deprive the farmer-debtor of the right to proceed—before rights have vested—by reinstatement to obtain the benefits of the Act, is to permit dismissal at the instance of the farmer's creditors and without the farmer's knowledge to prove a ready means of circumventing the Act.[10] Title to a farmer's property acquired in the manner pursued by petitioner cannot limit the power of the bankruptcy court to afford the protection of and to enforce this remedial legislation.

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[9] See note 6, *supra.*

[10] Cf. In re Price, 99 F. (2d) 691, 694.